Editor's note: Reconsideration granted; decision vacated -- See John A. Paine, 66 IBLA 77 (July 29, 1982)

JOHN A. PAINE

IBLA 75-428 Decided September 17, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA-7717.

Affirmed.

1. Alaska: Native Allotments

   The requirement of "substantially continuous use and occupancy of the land for a period of five years" applies to all applicants under the Alaska Native Allotment Act, regardless of where the land is situated.

2. Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Generally

   The requirement of use and occupancy for a period of five years in order to receive an allotment under the Alaska Native Allotment Act must be completed by December 18, 1971. If an applicant for a Native allotment has not completed the 5 years prior to that date, he does not qualify under the Alaska Native Allotment Act.

APPEARANCES: Henry W. Cavallera, Esq., of Alaska Legal Services Corp., Dillingham, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

John A. Paine filed Native allotment application AA-7717 for approximately 160 acres of land in T. 10 S., R. 39 W., S.M., pursuant to the Alaska Native Allotment Act (the Act), as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (subsequently repealed by

43 U.S.C. § 1617 (Supp. III, 1973)). The Alaska State Office, Bureau of Land Management, rejected appellant's application by decision dated February 28, 1975. Appellant appeals from that decision.

The State Office decision determined that appellant had not demonstrated by clear and credible evidence the requisite use and occupancy of the land as required by the Act and regulations issued thereunder. The decision ruled that witness statements executed by appellant and his father did not overcome the conclusion of the field examination report that appellant had not used and occupied the land as contemplated by the Act.

Appellant argues first that the requirement that a Native allotment applicant must show five years of the requisite use and occupancy applies only to a Native applying for lands within a national forest. Appellant then argues that the witness statements executed by himself and by his father and submitted to the State Office are sufficient "to warrant the issuing of the appellant's allotment." Further, appellant submits on appeal two additional witness statements in support of his claimed use of the land.

Appellant's allotment application, dated May 12, 1970, states that he has been using the land every year since 1960, for berrypicking from July to September and for hunting and trapping from September to December. The application also lists various improvements on the land, including a "Fish rack" built in 1964, a "Home site house 20 x 24" built in 1966, and a "Warehouse" built in 1967. Appellant was born June 20, 1949.

The field examination was conducted on September 23, 1973. In his report, the field examiner stated that after "extensive aerial search by helicopter and subsequent ground search" he could not locate any of the claimed improvements nor any evidence of use other than one corner post, another post, "some public use snowmobile trails," and "10-20 year old wood cuttings." The report concludes with a recommendation that appellant's application be rejected.

The witness statements of appellant and his father were executed on October 5, 1974, and the two submitted on appeal were executed on April 3, 1975, by Simeon Zacker, a friend, and Dallia Andrew, a relative. Appellant's own statement does not indicate that there are, or were, any improvements on the land. It repeats that he uses the land for berrypicking, trapping and hunting, and that his parents also use the land. However, it states that he began using the land in "1969". The father's witness statement is essentially the same except that it states that appellant has used

the land since "1969 or 1970." The witness statements submitted on appeal also do not indicate any improvements and state the same uses of the land. Both state that the local villagers also use the land. As for when appellant began using the land, Zacker states that this is "hard to say" and Andrew states that appellant began in "1967."

[1] The requirement that a Native show "substantially continuous use and occupancy of the land for a period of five years" is set forth at both 43 U.S.C. § 270-3 (1970) and at 43 CFR 2561.2. This Board has previously held that this requirement applies to all applicants under the Act, regardless of where the allotment applied for is situated. Heldina Eluska, 21 IBLA 292, 293-294 (1975); Walter Bergman, 21 IBLA 173, 175-176 (1975).

[2] The Board has also previously held that an applicant must complete his 5 years of use and occupancy prior to December 18, 1971, the date of the enactment of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. (Supp. III, 1973). Walter Bergman, supra at 176; Memorandum of Assistant Secretary, Land and Water Resources, to Director, Bureau of Land Management, dated October 18, 1973. Thus, in order to qualify for an allotment, appellant had to have initiated his use and occupancy of the land prior to December 18, 1966.

Appellant, in his own witness statement, declares that he did not begin using the land until 1969, well after December 18, 1966. Although appellant's application states that he began using the land in 1960, his witness statement makes substantial changes from the earlier document. Moreover, two of the other three witness statements also show that appellant began using the land after the qualifying date. Appellant has not disputed any of the information contained in the witness statements and has in fact urged their acceptance. Because appellant's use and occupancy of the land was for a period of less than 5 years on December 18, 1971, he does not qualify for an allotment under the Act and his application must be rejected. Walter Bergman, supra at 176-177; Memorandum of Assistant Secretary, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge